

## ACT III OF THE MINISTERIAL EXCEPTION

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### INTRODUCTION

Law is filled with stories without endings. Case reports and law review articles generally conclude with the judgment on a case. Once judgment is rendered, either by a judge or by a scholar analyzing an opinion, it is unusual for anyone to consider what happens next.<sup>1</sup> In drama, a gun that appears onstage in Act I is sure to go off in Act III: the play has not ended until there is a climax; until the full narrative has reached its conclusion.<sup>2</sup> In law, the curtain often draws shut abruptly at the end of Act II.

One obvious reason for this is that the law and its students generally focus on a single question: the question of legal power—especially the power of courts to order some action and make it stick.<sup>3</sup> Authority, jurisdiction, liability or immunity; terms like these are the meat and drink of the law—the keys that unlock the answer to the question of who gets to “say what the law is.”<sup>4</sup>

It is all perfectly natural, and perfectly odd. Consider some famous cases that turn on the question of the nature and limits of judicial power. It is natural to want to know, in a case in which a police department has been using a potentially lethal “chokehold” method of restraint, whether the department can be made to cease its conduct.<sup>5</sup> If the government is accused of bombing a country with which it is not at war, you naturally want to know whether it can be ordered to ground its planes.<sup>6</sup> If a private company is collaborating with a state to engage in the extraordinary rendition of individuals to nations that commit torture, you want to know whether the company can be held to account, or whether any litigation should be

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<sup>1</sup> As always, there are exceptions. See, e.g., Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63 (1998).

<sup>2</sup> See ACADEMIC DICTIONARY OF FICTION 40 (Ashish Pandey ed., 2005) (citing Anton Chekhov).

<sup>3</sup> See, e.g., Christoph Menke, *Law and Violence*, 22 LAW & LIT. 1, 11 (2010) (“Law is about power, its own power.”). The canonical discussion is Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

<sup>4</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (link).

<sup>5</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (link).

<sup>6</sup> See, e.g., *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (link).

dismissed because it would require the revelation of sensitive confidential information.<sup>7</sup>

Unless your focus is narrow and your curiosity highly limited, however, you will also want to know what happens next. Unless you confuse the “is” of judicial or governmental power with a moral “ought,” you are unlikely to think that the fact that a party, public or private, *can* do something without legal consequences means that it *should*. Some party will be left with the final authority to act. However, *how* it acts matters as much or more than the fact that it *can* act. To say that a dispute is out of the court’s hands does not mean it is in no one’s hands at all. The party with the authority will still have a choice about what to do with that authority. And when, in one of these judicial dramas, the court’s obligations end, our obligations as citizens are just beginning. We must decide whether to bow out of the tale, leaving the party with the authority to act as it wishes, or whether we should take soft or hard action to persuade it to act as we think it should. Legal power is not always the last word.

In its 2011 October Term, the Supreme Court will decide whether to uphold the “ministerial exception” in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*.<sup>8</sup> This judicial doctrine, rooted in the Religion Clauses of the First Amendment, provides that churches are entitled to legal immunity from employment discrimination claims brought by employees acting in a “ministerial” position.<sup>9</sup>

If experience is any guide, the discussion on both sides of this question will focus on Act II. It will focus on power, jurisdiction, and immunity. At the extremes, it will involve arguments over whether the Religion Clauses require complete immunity from suit in ministerial discrimination cases or whether they require churches to be treated the same as any other employer.<sup>10</sup> And in many respects, there will be a tendency, more or less

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<sup>7</sup> See, e.g., *Totten v. United States*, 92 U.S. 105 (1875) (link); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc) (link).

<sup>8</sup> 131 S. Ct. 1783 (2011) (link). For the oral arguments, held on October 5, 2011, see Transcript of Oral Argument, *Hosanna-Tabor*, 131 S. Ct. 1783 (No. 10533), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-553.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-553.pdf) (link).

<sup>9</sup> See, e.g., *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1040–41 (7th Cir. 2006) (link); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 350–51 (5th Cir. 1999) (link); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461–62 (D.C. Cir. 1996) (link); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168–69 (4th Cir. 1985) (link); *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972) (link). As one court put it, the basic rule suggests that one or both of the Religion Clauses “deprive[] a federal court of jurisdiction to hear a Title VII employment discrimination suit brought against a church by a member of its clergy, even when the church’s challenged actions are not based on religious doctrine.” *Combs*, 173 F.3d at 345.

<sup>10</sup> There are intermediate positions, of course. One could argue that the Religion Clauses do not require the ministerial exception but that legislatures are free to enact such exceptions. Or one could concede that the ministerial exception exists as a matter of constitutional law but argue over the occasions for its application. It is possible to take an intermediate position like this without confusing “is” and “ought,” although some people will do so even then.

overt, to treat the answer to the power question as dispositive of the question of whether churches ought to invoke the ministerial exception whenever they wish.

In this Essay, I argue that we are wrong to treat *Hosanna-Tabor* and the ministerial exception doctrine as ending with Act II. Rather, in thinking about the doctrine, we—especially those of us who have championed the ministerial exception<sup>11</sup>—have a scholarly and moral obligation to think about what happens next, assuming that the Supreme Court reaffirms the doctrine and its constitutionality. We need to do so from a perspective that acknowledges the dangers as well as the value of church autonomy. This perspective treats churches as imperfect institutions, not saintly ones, and asks what sorts of nonlegal levers—from internal debates within churches to external public criticism—might encourage churches to exercise their authority sensitively and appropriately. Conversely, opponents of the ministerial exception doctrine ought to cease caricaturizing churches as self-interested institutions whose only apparent goal is to escape legal liability for egregious employment practices. These critics should think instead about the role that *nonlegal* mechanisms can play in encouraging fairness to employees.

I begin by offering a defense of the ministerial exception doctrine. Because other writers in this colloquy focus on that question, I will keep my own contributions relatively brief.<sup>12</sup> I then discuss the role of both internal religious discussion and external public criticism as tools for policing the use of the ministerial exception. I argue that “Act III” thinking is necessary not only to properly evaluate the law in this area, but also because scholars and citizens have a moral obligation to think about what autonomous institutions like churches *ought* to do, not just about how the law allocates authority in this area.

## I. THE MINISTERIAL EXCEPTION AS POWER

The basic defense of the ministerial exception starts with history and first principles. The historical argument is ultimately a recapitulation of Western legal and political history itself. As Michael McConnell puts it:

[F]rom at least the time of Pope Gelasius [in the fifth century A.D.], standard legal thinking in Western Europe was based on the theory of Two Kingdoms—the idea that God created two different forms of authority, two swords that were clearly distinguished: spiritual and temporal,

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<sup>11</sup> See, e.g., PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (forthcoming 2012) (on file with author); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009) (link).

<sup>12</sup> For a more extensive presentation of my views, see the works cited *supra* note 11.

sacred and secular, church and state. These spheres were undeniably separate, and not because the state chose to make them so.<sup>13</sup>

That general concept endured even after the schism in Western Christianity caused by the Reformation. Lutheran thought, for instance, did away with the concept of “two swords,” but replaced it with one of “two kingdoms.”<sup>14</sup> Despite their differences, a common theme ran through these formulations: “the spiritual and temporal powers” must “remain separate in function,” and at a minimum, the temporal authority has “no power to . . . mete out religious discipline.”<sup>15</sup>

The American tradition of separation, revolutionary as it seemed, is basically continuous with this history. As one of the amici curiae in the *Hosanna-Tabor* case observes, “This differentiation between the institutions of church and state has become a part of the American constitutional tradition.”<sup>16</sup> Indeed, the tradition predates the Constitution itself. It can be found in the writings of Roger Williams,<sup>17</sup> the structure of the Puritan communities in New England, and elsewhere.<sup>18</sup> The preamble to the Laws and Liberties of Massachusetts Bay in 1648, for example, proclaimed: “[O]ur churches and civil state have been planted, and grown up (like two twins),” and to conflate the two would lead to the “misery (if not ruin) of both.”<sup>19</sup> Closer to the Revolutionary Era, it was apparent in the thinking of John Adams, who admired the vision of separate spheres championed by the Puritans and made sure that the Massachusetts Constitution of 1780 guaranteed the right of churches to select their own ministers without state interference.<sup>20</sup> It was also evident in the “strikingly

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<sup>13</sup> Michael W. McConnell, *Non-State Governance*, 2010 UTAH L. REV. 7, 8 (link). For similar sentiments, see, e.g., Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869 (2009) (book review) (link); John Witte, Jr., *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869 (2003) (book review).

<sup>14</sup> See, e.g., William B. Ewald, *The Protestant Revolutions and Western Law*, 22 CONST. COMMENT. 181, 188 (2005) (reviewing HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* (2003)).

<sup>15</sup> Witte, *supra* note 13, at 1878–79.

<sup>16</sup> Brief Amici Curiae of Professor Eugene Volokh et al. in Support of Petitioner at 6, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 131 S. Ct. 1783 (2011) (No. 10-533), 2011 WL 2470847, at \*6 [hereinafter Volokh Brief].

<sup>17</sup> See, e.g., Edward J. Eberle, *Roger Williams on Liberty of Conscience*, 10 ROGER WILLIAMS U. L. REV. 289, 290–91 (2005).

<sup>18</sup> See Horwitz, *supra* note 11, at 100–04. For other examples, see Volokh Brief, *supra* note 16, at 12–18.

<sup>19</sup> LAWS AND LIBERTIES OF MASSACHUSETTS BAY A2 (1648) (Max Farrand ed., 1929).

<sup>20</sup> See JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* 309–11 (2007); see also Joshua D. Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2016 (2007) (quoting the relevant passage of Massachusetts’s constitution).

jurisdictional” language that James Madison employed in his influential *Memorial and Remonstrance*: “[I]n matters of Religion, no man’s right is abridged by the institution of Civil Society, and . . . Religion is wholly exempt from its cognizance.”<sup>21</sup> In the post-revolutionary period, “[t]he key to resolving” church versus state disputes “was to define a private sphere, protected against interference by the vested rights doctrine and the separation of church and state.”<sup>22</sup> The American tradition, in short, has long embraced “a constitutional order in which the institutions of religion . . . are distinct from, other than, and meaningfully independent of, the institutions of government.”<sup>23</sup>

Some central constitutional principles rest on this historical foundation. The most important is the oft-repeated notion that religious institutions in this nation must have the “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>24</sup> Similarly, the state may not interfere with a church’s selection or rejection of its religious members, let alone its leaders.<sup>25</sup>

A third principle regularly derived both from this history and from broader views about the judicial role in church-state cases is that judges cannot evaluate the kinds of religious questions that come up in employment discrimination cases involving ministerial employees, among other places. This position is sometimes called the “hands off” rule.<sup>26</sup> One standard argument for this rule is that judges are simply incompetent to address religious questions. For strategic reasons, opponents of the ministerial exception focus substantially on judicial incompetence. It allows them to argue that many ministerial exception cases raise issues that

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<sup>21</sup> Smith, *supra* note 13, at 1880 (alterations in original) (emphasis omitted) (quoting JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), *reprinted in* CHURCH AND STATE IN THE MODERN AGE 59, 60 (J.F. Maclear ed., 1995)) (internal quotation marks omitted).

<sup>22</sup> Michael W. McConnell, *The Supreme Court’s Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic*, 37 TULSA L. REV. 7, 42 (2001).

<sup>23</sup> Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN’S J. LEGAL COMMENT. 515, 523 (2007).

<sup>24</sup> *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (link).

<sup>25</sup> See, e.g., *id.* at 119 (observing that free exercise of religion entails freedom of “an ecclesiastical right, the Church’s choice of its hierarchy”); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) (“[I]t is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.”) (link); *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139–40 (1872) (recognizing that courts “cannot decide who ought to be members of the church”) (link); *McClure v. Salvation Army*, 460 F.2d 553, 558–59 (5th Cir. 1972) (“The relationship between an organized church and its ministers is its lifeblood. . . . Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern[]” and lie “beyond the purview of civil authorities.”).

<sup>26</sup> See generally Samuel J. Levine, *The Supreme Court’s Hands-Off Approach to Religious Doctrine: An Introduction*, 84 NOTRE DAME L. REV. 793 (2009) (discussing the Supreme Court’s “hands-off approach”) (link).

judges are competent to decide,<sup>27</sup> and that courts engaged in case-by-case analyses of such disputes end up entangled in even more theological questions.<sup>28</sup>

So the conventional justifications for the ministerial exception consist of a set of simple principles that, its supporters contend, have a long historical pedigree. Courts cannot decide religious disputes. Thus, they may not resolve questions of church doctrine or governance. And they may not interfere in a church's decision about who constitutes an acceptable leader or member. These principles focus on the fundamentals of religious freedom—those rights without which basic religious freedom could not be said to exist—and on the incapacities of courts. For many supporters of the ministerial exception, however, they are still just surface matters, conclusions that follow from deeper premises. They lead us back to the central question that occupies the law, at least up through Act II: the question of power.

Here, some of us see a fundamental and perhaps more radical principle underlying not only the ministerial exception, but the law of religious freedom generally: courts, and the state itself, are simply not authorized to intervene in life at the heart of churches. At a deep level, these questions lie beyond the reach of the state altogether. The two kingdoms of temporal and spiritual authority, of church and state, constitute two separate sovereigns. The state can no more intervene in the sovereign affairs of churches than it can in the sovereign affairs of Mexico or Canada. This allocation of authority is not intended to signal the primacy of churches or the inferiority of the state. It is a double-sided settlement as ancient as Western political culture itself, one that says that “government is not the sole possessor of sovereignty” and that churches “exercise within the area of [their] competence an authority so effective as to justify labeling it a sovereign authority” all their own.<sup>29</sup> Whatever a church's “area[s] of competence” may be, it extends at least to fundamental questions of church structure and leadership, and thus removes the state from control over ministerial employment decisions like those in *Hosanna-Tabor*. As radical as this description may seem, it lies at the heart of the Western church-state settlement. It is reflected in the many decisions in which courts have said

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<sup>27</sup> See, e.g., Brief of Amici Curiae Law and Religion Professors in Support of Respondents at 26, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 131 S. Ct. 1783 (2011) (No. 10-533), 2011 WL 3532698, at \*26 (“Hosanna-Tabor incorrectly assumes that adjudicating ministers’ antidiscrimination claims will require courts to decide questions beyond their institutional competence. A court may decide [a plaintiff’s] retaliation claim without ever becoming entangled in doctrinal or theological questions.”) [hereinafter Professors’ Brief].

<sup>28</sup> See *id.* at 32–35.

<sup>29</sup> Mark DeWolfe Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953).

that the ministerial exception is not merely an affirmative defense but a *jurisdictional* matter.<sup>30</sup>

The power-based argument for the ministerial exception is not novel. But it is radical, or at least it may seem so to those who have grown accustomed to thinking that the state is the ultimate arbiter. Its opponents have room to argue that it runs contrary to the statist orientation of modern law, exemplified by the Supreme Court's opinion in *Employment Division v. Smith*, which said that the Free Exercise Clause could not stand in the way of any neutral and generally applicable law that only incidentally burdens religion.<sup>31</sup>

But even the relatively statist modern Supreme Court has recognized that there are realms the law is not free to enter. If the greatest weakness of the proponents of the ministerial exception is the sweeping nature of their claims, its opponents' greatest weakness is that they ignore the fact that the Court has never pushed too hard on the rule of general applicability and other imperial claims on the part of the state. It has always pulled back, recognizing limits to the state's reach where central internal religious practices are involved. *Smith* itself is an example. Citing its long history of deference and abstention in cases involving church property and employment, the Court reaffirmed the central Free Exercise principle that government must not "lend its power to one or the other side in controversies over religious authority or dogma."<sup>32</sup> Even after *Smith*, core areas of church doctrine and governance remain untouched by the state.<sup>33</sup>

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<sup>30</sup> See, e.g., *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 775 (6th Cir. 2010) (link); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007) (link); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1039 (7th Cir. 2006); see generally Gregory A. Kalscheur, S.J., *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43 (2008) (exploring the jurisdictional aspects of the ministerial exception) (link). For a broader historical argument to this effect, see Carl H. Esbeck, *Dissent & Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385; see also Volokh Brief, *supra* note 16, at 4 ("The civil authority lacks 'competence' to intervene in such matters, not so much because they lie beyond its technical or intellectual capacity, but because they lie beyond its jurisdictional power.").

<sup>31</sup> 494 U.S. 872 (1990) (link).

<sup>32</sup> *Id.* at 877.

<sup>33</sup> See Reply Brief for the Petitioner at 6, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 131 S. Ct. 1783 (2011) (No. 10-533), 2011 WL 3919718, at \*6 (noting that "*Smith* preserved a longstanding distinction between internal church governance, including selection of ministers, and conscientious objection to general regulation," only the latter of which is subject to *Smith*'s rule of neutrality, and arguing that this distinction has been around since at least the time of John Locke) [hereinafter Reply Brief].

Besides *Smith*, the other case emphasized by opponents of the ministerial exception is *Jones v. Wolf*, in which the Supreme Court held that states may (but need not) resolve church property disputes by giving legal recognition to the non-religious language of church constitutions, property deeds, state statutes, and other relevant legal documents, just as they would in other property disputes. 443 U.S. 595 (1979) (link). Because *Jones* allows courts to use the "neutral principles" approach rather than requiring deference to churches in all cases, some critics argue that it "seriously undercuts any argument that [the Court's prior] cases guarantee a broad right of church autonomy." Caroline Mala Corbin, *Above the*

In short, if the advocates of the ministerial exception can be criticized for thinking too big, emphasizing church autonomy in a general way while neglecting important practical and doctrinal details, its opponents can be criticized for overreading (and sometimes misreading) the doctrine and neglecting the fundamental principles that lie behind it. The ministerial exception is not some incidental, ad hoc creation. It is a fundamental part of the structure of American religious freedom; a recognition of the basic idea that the First Amendment, the Constitution, and Western constitutionalism more generally guarantee a “free Church in a free State.”<sup>34</sup> It ensures, at a minimum, that absent extraordinary circumstances, churches must have a free hand in selecting those who perform basic religious functions.<sup>35</sup> One need not accept the widest possible account of church autonomy in order to agree on that much.<sup>36</sup> As a legal matter, then, I

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*Law? The Constitutionality of the Ministerial Exemption From Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1987 (2007) (link). They read the phrase “neutral principles” in *Jones* together with the “neutral and generally applicable law” language of *Smith* to suggest a general rejection of church autonomy. On this view, *Jones* stands for the proposition that courts should “[a]pply employment discrimination law to a religious employer in the same way it would be applied to a secular employer.” Professors’ Brief, *supra* note 27, at 36.

As I have written elsewhere, however, *Jones* “was, in short, an effort to accommodate church autonomy, not to eliminate it.” Horwitz, *supra* note 11, at 118 (emphasis omitted); see also Perry Dane, “*Omalous*” *Autonomy*, 2004 BYU L. REV. 1715, 1743–44 (arguing that the neutral principles approach makes sense only “in the context of an effort to effectuate a religious community’s effort to specify the form that the community’s autonomy should take through some type of private ordering”) (link). Its point was to allow churches to use legal language in deeds, trusts, and other documents to *insulate* themselves from judicial interference. In any event, even *Jones* says explicitly that the “neutral principles” approach only applies where a court can interpret a legal document relating to church property disputes without deciding questions of “religious doctrine or polity.” *Jones*, 443 U.S. at 602.

<sup>34</sup> ABRAHAM KUYPER, LECTURES ON CALVINISM 78, 99 (photo. reprint 2007) (1898). Cf. EEOC v. Catholic Univ. of Am., 83 F.3d 455, 462 (D.C. Cir. 1996) (noting that the lower courts’ ministerial exception decisions “rely on a long line of Supreme Court cases that affirm the fundamental right of churches to ‘decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’” (quoting *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952))) (link).

<sup>35</sup> See, e.g., Reply Brief, *supra* note 33, at 10 (*Hosanna-Tabor* “is about institutional separation—the least controversial core of separation of church and state”); *id.* (“The government cannot control the internal affairs of churches any more than churches can control the institutions of government.”).

<sup>36</sup> See, e.g., Volokh Brief, *supra* note 16, at 32 (conceding that not everyone counts as a “minister” for purposes of the ministerial exception); *id.* at 39 (noting that “there are difficult questions to be asked and fine lines to be drawn” in the doctrine). That said, one advantage of an emphasis on the ministerial exception as an example of the limits of state power is that it reduces or eliminates some of the hangover questions that its opponents argue will persist as long as it is narrowly applied. For example, it has been argued that as long as courts decide who counts as a minister on a case-by-case basis, they will end up far more entangled with religion than they would be if the ministerial exception were simply done away with. See, e.g., Professors’ Brief, *supra* note 27, at 32–35. Those entanglement questions will largely disappear if, as they should, courts, recognizing the limits of their authority in this realm, defer substantially to the churches’ own determinations that an employee is a minister. See Reply Brief, *supra* note 33, at 22 (arguing that a broad ministerial exception rule “is far less entangling than respondents’ invitation to probe deeply into every case”).



believe the Supreme Court in *Hosanna-Tabor* should affirm the existence and constitutional status of the ministerial exception.

## II. THE MINISTERIAL EXCEPTION AS RESPONSIBILITY

At first glance, the question of whether the ministerial exception exists may seem to be the only, or at least the most important, question raised by *Hosanna-Tabor*. It is neither. Just as we ought to care whether the United States actually bombs Cambodia and not just that the court says it will not interfere with such a decision, we likewise ought to care about what churches actually do with the ministerial exception, not just that it exists. We ought to care, in other words, about what actually happens on the ground in Act III when we move beyond the basic Act I or II question of power and think about what churches do with that power.

Thus, suppose that the Supreme Court either affirms the constitutional status of the ministerial exception or, alternatively, holds that it is not required, but permits Congress and the state legislatures to enact such an exception. Suppose also that the scope of the ministerial exception, whether constitutional or statutory, is broad: churches are given substantial deference in declaring a church employee to be a “minister” who falls under the exception and the exception applies to a variety of actions, including the retaliation action brought by Cheryl Perich in the *Hosanna-Tabor* case. What then? What should churches do with their victory? Should citizens consider their own role in the conversation to be over?

Surely a church’s deliberations as to when to invoke the exception and how to treat complaints will not end once the ministerial exception is firmly in place. While courts must defer to the church’s decision, deference does not tell us what the church should do.<sup>37</sup> The answer to that question will vary, just as churches vary. Assume for a moment that the ministerial exception is somewhat limited in scope, applying only to cases where a

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It is also worth acknowledging a broader argument made by the opponents of the ministerial exception: despite the occasional use of the language of church autonomy, courts frequently subject churches to various legal regimes, which they could not do if churches were truly autonomous. *See, e.g.,* Caroline Mala Corbin, *The Irony of Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 106 NW. U. L. REV. COLLOQUY 96, 105 n.60 (2011) (link). A strong view of church autonomy does raise questions about those cases. Again, however, all that is at issue in a case like *Hosanna-Tabor* is that, *at a minimum*, churches must be able to select and dismiss ministerial employees without fear of legal intrusion. *See, e.g.,* Reply Brief, *supra* note 33, at 10 (arguing that the rule that “government cannot control the internal affairs of churches,” including key employment decisions involving ministerial employees, is part of the “least controversial core of separation of church and state”). To argue against the doctrine altogether because it has *some* limits is no more sensible than it would be to argue that because employers can sometimes raise bona fide occupational qualifications as a defense in employment discrimination actions, we should simply do away with employment discrimination law.

<sup>37</sup> *See* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1072–73 (2008) (defining deference as “a decisionmaker following a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question independently”) (link).

church asserts that some employment action involves a direct conflict with religious doctrine.<sup>38</sup> Then the interaction between that church's doctrine and a forbidden employment action becomes legally relevant. It might well matter to the church for nonlegal reasons too. A church that strongly opposes racial discrimination, as virtually all of them do,<sup>39</sup> might *welcome* the availability of legal remedies in that situation for a variety of reasons: a belief that the church should generally obey the law, a belief that racial discrimination is wrong and deserves a legal remedy, and so on.

However, what if the ministerial exception is treated as genuinely jurisdictional in nature, leaving plaintiffs with no legal remedy in antidiscrimination cases involving ministerial employees? A church would still have a number of options, and its choices would still vary, depending on a mix of factors. A church that opposes discrimination might still want to provide ministers who complain of discrimination with an internal dispute resolution process and a set of remedies equivalent to those provided by the law. It might conclude that nothing less would satisfy its own religious belief that discrimination is wrong, and that the church owes it to victims of discrimination (and to God) to make them whole. Or it might provide meaningful alternative remedies due to a fear on the part of church leadership that a failure to take such claims seriously would lead to dissent and a loss of confidence in the leadership. In either case, the point is clear: the ministerial exception is not the same thing as indifference to the goals of civil rights laws, nor does it mean that particular churches would inevitably seek total immunity. Reasons of deep religious conscience, as well as practical concerns about the reaction of members, might lead a church to give claimants substantial rights, even in the absence of any judicial process.<sup>40</sup>

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<sup>38</sup> See, e.g., *Petruska v. Gannon Univ.*, 448 F.3d 615, 2006 U.S. App. Lexis 13135, at \*2 (3d Cir. 2006) (holding that a church must argue that discrimination is required by one of its religious tenets before the ministerial exception can apply), *vacated*, 462 F.3d 294 (3d Cir. 2006); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 959 (9th Cir. 2004) (allowing sexual harassment claim to proceed against church where it did not offer a religious reason for its conduct) (link). The *Gannon* opinion was vacated and replaced by a broader decision holding that the ministerial exception applies even where the basis for the employment action is non-religious. See *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–04 (3d Cir. 2006) (link).

<sup>39</sup> See, e.g., THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH ¶ 430 (2008), available at <http://www.nyac.com/pages/detail/1755> (“[A]ppointments are made without regard to race, ethnic origin, gender, color, disability, marital status, or age, except for the provisions of mandatory retirement.”) (link). For these and other citations to specific provisions of church discipline, I am indebted to Chris Lund for his recent article defending the ministerial exception. See Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 101 (2011) (link).

<sup>40</sup> It should also be noted that even under this strong jurisdictional reading of the ministerial exception, not all disputes involving ministers would necessarily be outside the jurisdiction of the courts. As the church notes in its reply brief in *Hosanna-Tabor*:

Another question is how churches should *treat* the claimants in such cases. The fact that the judicial process would be unavailable does not mean churches would lack any interest, religious or otherwise, in providing due process to claimants. Indeed, some churches provide strong procedural protections for ministers dismissed under these circumstances—protections that predate the judicial recognition of the ministerial exception.<sup>41</sup> Consider the Lutheran Church—Missouri Synod, whose conduct is at issue in *Hosanna-Tabor*. Although the church considers itself the sole arbiter of employment disputes involving its ministers,<sup>42</sup> its dispute resolution procedures are no charade. They include a basic trial process, limited discovery, the right to counsel, and an appeal process. They also establish neutral tribunals whose members are maintained by the Synod itself, not the local congregation.<sup>43</sup> The church’s substantive standards are also real. Indeed, the Synod’s laws might ultimately have vindicated Perich’s complaint.<sup>44</sup> As one amicus group of experts on religious tribunals observes, although “[r]eligious court systems can be quite varied,” many “share certain primary characteristics, including discernible substantive standards and procedural rights,” as well as “a stated commitment to even-handedness” and an effort to “ensure that the religious organization is not unfairly favored in the crafting and execution of the process.”<sup>45</sup>

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When a church signs a contract written in secular language, the contract can be enforced unless the basic dispute is entangled in religious questions. So, for example, a contract claim challenging discharge for cause generally cannot proceed, but a contract claim for unpaid salary or benefits generally can. Such secular contract claims have always co-existed with the ministerial exception.

Reply Brief, *supra* note 33, at 9. This is further evidence that the ministerial exception’s opponents misread *Jones v. Wolf*. See *supra* note 33. *Jones* does not mean churches are *never* entitled to autonomy. Instead, by allowing churches to draft employment contracts with ministers that are at least partly enforceable in court, it allows churches to voluntarily limit the scope of their autonomy, leaving room for some legally enforceable employment claims by ministers where, for various reasons, churches wish to expose aspects of their relationships with ministers to the jurisdiction of the civil courts. See *Jones v. Wolf*, 443 U.S. 595 (1979).

<sup>41</sup> See, e.g., Amicus Curiae Brief of the National Jewish Commission on Law and Public Affairs (“COLPA”) Filed on Behalf of the Orthodox Jewish Organizations and Rabbinical Courts in Support of Petitioner at 7–8, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 131 S. Ct. 1783 (2011) (No. 10-553), 2011 WL 2470841, at \*7–8 (discussing the history of rabbinic courts) [hereinafter COLPA Brief].

<sup>42</sup> See HANDBOOK OF THE LUTHERAN CHURCH: MISSOURI SYNOD § 1.10.2 (2004), available at [www.lcms.org/Document.fdoc?src=lcm&id=926](http://www.lcms.org/Document.fdoc?src=lcm&id=926) (link).

<sup>43</sup> See Lund, *supra* note 39, at 142–43; see also Steven R. Hadley, *Handbook of American Church Courts*, 22 WHITTIER L. REV. 251, 263 (2000) (citing the Seventh-Day Adventists as one example of a church whose dispute resolution procedures call for “neutral, impartial, and independent” adjudicators).

<sup>44</sup> See Lund, *supra* note 39, at 143 (noting that “the Synod’s church courts would only approve of Perich’s call being terminated in rare and specifically delineated circumstances”).

<sup>45</sup> Brief of Religious Tribunal Experts Amici Curiae in Support of Petitioner at 6–7, *Hosanna-Tabor*, 131 S. Ct. 1783 (No. 10-533), 2011 WL 2470843, at \*6–7 [hereinafter Religious Tribunal Experts’ Brief].

In short, it would be wrong to end one's inquiry at Act II and assume that the ministerial exception leaves claimants with no recourse whatsoever. Unsurprisingly, given the long history of church jurisdiction over internal religious matters, churches themselves regularly provide meaningful procedural and substantive justice in disputes with their members or leaders.<sup>46</sup>

Three additional issues need to be considered in our examination of Act III of the ministerial exception. First, some churches believe as a matter of religious doctrine that churches themselves ought to decide disputes with their ministers, even when they share the basic goals of the civil rights laws.<sup>47</sup> They believe that disputes within the church should be resolved informally and not antagonistically, that internal dispute resolution is part of the shepherding function of the church and should be undertaken with compassion and care, that litigating such cases in the civil courts is a public scandal or causes irreparable harm to the relationship between church and minister, and so on.<sup>48</sup>

Second, some churches hold complex views about the effect of an internal dispute on the relationship between the minister and the church. From a secular perspective, we may view the assertion of one's legal rights as a common, even laudable, phenomenon. From a communal and religious perspective, however, such conduct may violate both church doctrine favoring the internal resolution of disputes and the spirit of community and peacefulness that guides the church.<sup>49</sup>

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<sup>46</sup> See, e.g., COLPA Brief, *supra* note 41, at 10 (citing a judgment in an employment dispute decided by a *beth din*, or rabbinic court, that "substantially exceeded any judgment the employee could have obtained in a New York court"); Religious Tribunal Experts' Brief, *supra* note 45, at 8 (noting that the Judicial Council of the United Methodist Church "has issued over 1,100 decisions addressing diverse ecclesiastical issues within the UMC, including ministerial employment matters"); *id.* at 8 n.9 (citing a decision of that tribunal in which it ordered the reinstatement of a clergy member, along with the payment of "retroactive benefits and compensation," after finding a violation of due process in the prior proceeding); *id.* at 19 n.55 (citing cases in which *beth din* courts found in favor of rabbis in employment disputes with synagogues); see generally Hadley, *supra* note 43 (discussing cases).

<sup>47</sup> As Chris Lund explains:

Even when churches agree with the principle of non-discrimination laws, they [may] still have quite understandable reasons to object to the government investigating, adjudicating, and remedying what the government decides are discriminatory acts. There is all the difference in the world between a church pursuing its own values and the state enforcing those values back on the church.

Lund, *supra* note 39, at 141–42.

<sup>48</sup> These and other arguments can be found in Hadley, *supra* note 43.

<sup>49</sup> See, e.g., Brief for International Mission Board of the Southern Baptist Convention et al. at 22–23, *Hosanna-Tabor*, 131 S. Ct. 1783 (No. 10-553), 2011 WL 2470840, at \*22–23 ("In essence, the Church concluded that Perich's conduct [pressing her claims through the threat of litigation] impeded, and that she was not sufficiently committed to, the Church's religious mission.").

Third, even if a church takes neither of these positions, and even if it strongly opposes discrimination, it may have a different view of what constitutes “discrimination.”<sup>50</sup> It is surely unsurprising that churches may champion the view that all are equal in God’s eye, but take a different view than the law does about what constitutes equal status—concluding, for example, that women are equally beloved by God, but occupy a role in the church that does not involve the call to ministry.

Churches need not hold any of these views, but they may hold some or all of them. That matters for both Act II and Act III reasons. First, it suggests that there are problems with the argument that the ministerial exception should not apply to retaliation suits. Unlike a decision to fire an employee on religious grounds, the argument goes, a church’s decision to fire an employee in retaliation for the exercise of her legal rights does not involve entanglement with religious doctrine; the court can accept that the church had religious reasons for retaliation but still conclude that churches are not exempt from antiretaliation laws.<sup>51</sup> As we have seen, however, churches hold complex views with respect to the nature of their relationship with ministers and with the civil courts. A plaintiff’s decision to bring a retaliation action in a civil court, and not a religious one, can thus raise theological questions of a high order. My own view is that the ministerial exception has more to do with the limits of state power than with questions of entanglement. Regardless, there is little doubt that allowing antiretaliation suits to proceed raises serious entanglement concerns.<sup>52</sup>

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<sup>50</sup> See Lund, *supra* note 39, at 145 (“[M]ost churches see themselves as fully committed to racial justice, to gender equality, to treating the disabled with dignity, and to protecting the elderly. But there is no reason to think that the church’s conception of any of these things matches the state’s conception.”). Churches can also take a view of “discrimination” that is *broad*er than its legal definition. See *id.* at 146 (noting that some churches’ aggressive efforts to increase the number of women in the ministry could violate current antidiscrimination law).

<sup>51</sup> See, e.g., Brief for the Federal Respondent at 37, *Hosanna-Tabor*, 131 S. Ct. 1783 (No. 10-553), 2011 WL 3319555, at \*37. There is an interesting inconsistency here. Critics of the ministerial exception insist that the best way to avoid entanglement in retaliation cases is not to accept the courts’ assertions of religious grounds on a blanket basis but to dismiss them as irrelevant under the rule in *Smith*. Elsewhere, however, they argue that courts must not accept at face value a church’s assertion that a particular employee is a minister but must instead engage in a careful consideration of the employee’s ministerial status. They then argue that this case-by-case approach would entangle the court in theological questions, and that the ministerial exception should therefore be abandoned. See, e.g., Professors’ Brief, *supra* note 27, at 32–35. These critics, in short, argue for deference to the church’s determinations in some cases and against deference in others; in both instances, their arguments ultimately favor the employee. See also Reply Brief, *supra* note 33, at 19 (noting a similar inconsistency between the *Hosanna-Tabor* respondents’ petition for certiorari and their merits brief: they initially complained that the ministerial exception is illegitimate because it “require[s] a fact-intensive inquiry,” and now complain that the ministerial exception “is an overly ‘broad’, ‘categorical’, and ‘prophylactic immunity’, inconsistent with case-by-case resolution of constitutional questions.”).

<sup>52</sup> See Reply Brief, *supra* note 33, at 23–27 (arguing that the ministerial exception must apply to antiretaliation claims).

These issues are especially relevant within the Act III realm. There is a rich diversity of potential responses by churches to claims of discrimination on the part of a ministerial employee. In concrete terms, they can offer anything from no process at all, to an informal and communal process, to a detailed trial process with substantial guarantees of fairness and impartiality. Just as important, though, are the less concrete considerations. Churches can treat discrimination complaints as disruptions or even insults to the church and its members. Or they can take the view that the church has a religious duty to avoid discrimination, one that is every bit as central to the church as any other religious tenet. They can treat these complaints as isolated incidents or as matters that demand a broad institutional response. They can react with defensiveness or they can seek outreach, reconciliation, and growth. They can view the complainant as an adversary and close ranks or they can try to approach that individual with compassion, care, and a sense of community.

In sum, even if the ministerial exception continues to exist, a court's dismissal of a case on those grounds will not signal the end of churches' responsibilities, but rather the beginning. Churches will still have many decisions to make. Each one will reflect the church's deepest beliefs, its highest goals, and sometimes, its worst failings. Indeed, most of the important questions about the ministerial exception will not arise until Act III.

### III. THE MINISTERIAL EXCEPTION AND THE DUTY OF LAY AND PUBLIC DISCUSSION

So far, I have argued that church leaders have a continuing obligation to think carefully about the proper occasions for the ministerial exception and about how to treat ministers' complaints. That obligation carries a strong moral component. A church must consider its own religious duties, including the obligation to treat complainants with love and compassion; it must consider its obligations as an institution functioning at least partly in the secular world.

But the ministerial exception, like most allocations of power, does not just create duties for those who exercise it directly. As a reflection of the church's role as a major infrastructural institution within society,<sup>53</sup> the ministerial exception and its proper use should concern all of us. Monitoring its use, and sometimes criticizing it, is a civic duty as well as a religious one.

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<sup>53</sup> See, e.g., HORWITZ, *supra* note 11 (manuscript at 224); Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 274 (2008) (link); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 39–40 (2002).

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There is room here for both internal criticism and external public criticism.<sup>54</sup> Even within rigidly hierarchical institutions, there is a great deal of room for internal discussion, dissent, and reform. All institutions have many constituencies, any one of which can influence the institution's beliefs and actions. Even where a church's doctrine is set solely by its leaders, those leaders must still consider the potential effects of their actions on their members and the risk that those members will abandon the church. The leadership may conclude that some doctrine is so important that it must be preserved even at the cost of losing members, but it will certainly be aware of that potential cost. In less hierarchical religious institutions, it is even clearer that a church's treatment of its ministers is a communal matter that involves the whole church.

These kinds of questions involve both specific religious norms and general civic norms. In each dispute with a ministerial employee, the church and its members will have to consider not only what their religious tenets demand, but whether they have any general moral obligations to that employee and any general civic obligations to respect the social norms of nondiscrimination and conformity to the law.

These questions should also be aired outside the church itself. Citizens are not only permitted, but positively obliged to monitor and criticize our central social institutions, whether they belong to them or not. They are responsible for the civic order as a whole, including the institutions that form the bedrock of that civic order.

This duty is obvious when we are talking about the state, but it is just as true for private infrastructural institutions. Whether the *New York Times* publishes the Pentagon Papers or shares materials from the Wikileaks archives is a decision to be made in the first instance by that newspaper, operating in accordance with professional and institutional norms, and not the state.<sup>55</sup> But that paper's readers, and citizens more generally, have the duty to speak out if they believe that publication would threaten national security—or, conversely, to urge journalists to be even more aggressive in publishing information about important government actions that have been kept secret. University professors make their own decisions about what to teach and what research to conduct, and those decisions are insulated from public interference. This autonomy rests on several justifications, one being that academic freedom serves the public interest.<sup>56</sup> But that autonomy

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<sup>54</sup> For discussions applying this point to a variety of "First Amendment institutions," see Horwitz, *supra* note 11.

<sup>55</sup> See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (reversing an injunction preventing the *New York Times* from publishing classified material) (link); see also Reply Brief, *supra* note 33, at 26 (noting several areas of the law, all of them involving public or private institutions such as the press, in which "[legal] claims or remedies are barred because the resulting litigation would be too problematic or too threatening to other constitutional values").

<sup>56</sup> See, e.g., MATTHEW W. FINKIN & ROBERT C. POST, *FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM* 44 (2009) ("Academic freedom is the price the public must pay in

does not prohibit the public from monitoring and criticizing what universities do. To the contrary, it is a civic duty to do so, even—or perhaps especially—when the final authority rests with the institution itself.

These principles also apply to churches. If one believes that churches are a fundamental part of our social infrastructure, and that this requires some degree of church autonomy and some limits on state authority, then surely one must believe that churches' decisions are as subject to public commendation or criticism as the actions of any other major social institution. Churches may not be answerable in a legal sense for actions that lie at the heart of their institutional roles any more than newspapers are legally accountable to the public for decisions of whether to publish stories.<sup>57</sup> But they are not immune from public criticism, and they are not indifferent to it either. Like any other institution, they are susceptible to moral suasion, reasoned argument, positive and negative reinforcement, and public pressure. Citizens who care about our central social institutions can and should provide exactly those sorts of pressures.

All this is worth emphasizing because I have no interest in painting a rosy picture of churches or any other central social institution. Church independence, like freedom of the press, academic autonomy, and other institutionally-oriented constitutional freedoms, is grounded in a variety of ideas: that the state is limited in its authority, that our social infrastructure encompasses a variety of non-state institutions with their own spheres of authority, that our constitutional settlement assumes these divisions of authority, that courts are relatively incompetent to second-guess these institutions' core decisions, and others.<sup>58</sup> To subscribe to this structural view of the importance of both state and non-state institutions in our social and constitutional firmament, one need not believe that churches and other institutions are perfect or that they will never abuse their autonomy. Churches most certainly are not perfect and they will sometimes abuse their autonomy. It is unfortunate, but unsurprising, that the briefs in support of the plaintiff in *Hosanna-Tabor* say so much about churches' abuse of authority, and the briefs in support of churches say so little about it. Churches surely will fire ministers for good reasons, bad reasons, and sometimes for no reason at all.

Supporters of the ministerial exception, and church autonomy more broadly, must therefore avoid idealizing churches. They must acknowledge

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return for the social good of advancing knowledge.”); LOUIS MENAND, *THE MARKETPLACE OF IDEAS: REFORM AND RESISTANCE IN THE AMERICAN UNIVERSITY* 130 (2010).

<sup>57</sup> There are limits, of course, in both cases. Newspapers can be held accountable for libelous statements, and churches can be liable for injuries to members or third parties, whether they involve clergy sexual abuse or a church-owned van, driven by a minister, accidentally running over an old lady in the street. See Reply Brief, *supra* note 33, at 20. But these peripheral limits do not say much about institutional autonomy in core cases, like the hiring or firing of ministers.

<sup>58</sup> These and other justifications are canvassed, and sometimes criticized, in my forthcoming book. See HORWITZ, *supra* note 11.



that all legal autonomy, even of a limited sort, carries risks of abuse. If we are right about the deep nature of the constitutional settlement between church and state, about the valuable role played by independent churches in our constitutional and social infrastructure, and about the relative lack of judicial and legislative competence and authority when it comes to core church functions such as the selection of ministers, then the risk of abuse should not shake us from our position. But a candid recognition of these concerns may lead to a more realistic and productive conversation. It may lead us to think more clearly about the role of internal and external monitoring by church authorities, the laity, and citizens at large in encouraging churches to wield their power prayerfully, compassionately, and responsibly.

Conversely, recognizing the role of internal and external discussion and criticism may encourage the critics of the ministerial exception to ease up on their alarmist rhetoric. Some of the briefs in *Hosanna-Tabor* are crammed with language suggesting that churches are barely leashed monsters, waiting for a chance to run amok. They describe churches as espousing “a capacious theory of unaccountability,”<sup>59</sup> warn of a “lawless zone of defiance”<sup>60</sup> that would have “devastating” consequences, and urge the Court to reject any grant of “a special privilege to religious employers . . . that makes them a power unto themselves, separate and apart from the democratic will of the community.”<sup>61</sup> That is impoverished Act II thinking. It ignores the likelihood that most employment decisions made by churches will be made in good faith, and it assumes quite wrongly that the only effective check against abuse is a legal one. Public pressure and institutional reconsideration, not judicial relief, led the Los Angeles Police Department to abandon its chokehold policy and convinced the United States to stop bombing Cambodia.<sup>62</sup>

In short, consequentialist arguments against the ministerial exception will be wildly inaccurate unless they acknowledge the role of internal discussion and public criticism in shaping the institutional norms, policies, and actions of churches.<sup>63</sup> We cannot properly assess the costs and benefits

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<sup>59</sup> Brief of Bishopaccountability.org et al. as Amici Curiae in Support of Respondents at 23, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 131 S. Ct. 1783 (2011) (No. 10-533), 2011 WL 3532696, at \*23.

<sup>60</sup> Professors’ Brief, *supra* note 27, at 2.

<sup>61</sup> Brief of Amicus Curiae Neil H. Cogan in Support of Respondents Urging Affirmance at 4, *Hosanna-Tabor*, 131 S. Ct. 1783 (No. 10-533), 2011 WL 3532697, at \*4. I am not sure why it is more ominous to think of churches, an important mediating institution, as being “separate and apart from the democratic will of the community” than it is to think of them as abject servants of the popular will, subject to majority rule even with respect to core operations such as the selection of ministers.

<sup>62</sup> See *supra* notes 54–57 and accompanying text.

<sup>63</sup> It should be clear, moreover, that many of the arguments against the ministerial exception are consequentialist, and that the implications of those arguments are very broad. As I argued earlier, even if the Supreme Court holds that the ministerial exception is not constitutionally required, it could still allow legislatures to enact some form of exception. The briefs in *Hosanna-Tabor* are limited to the

of the ministerial exception or church autonomy—or, indeed, any other form of institutional autonomy—until we break out of a false dichotomy in which one side is blind to anything except state power, and the other side treats the church, the press, and other institutions as paragons of virtue. The former approach pays too little attention to vast stretches of our constitutional structure and culture and ignores the vital and often under-examined role of “communities and movements” within our broader system of constitutionalism.<sup>64</sup> The latter approach will leave many difficult questions unaddressed and will lack a full sense of moral accountability and integrity, unless it acknowledges the costs of institutionalism. We must talk candidly about potential abuses of the ministerial exception. But we must do so in a way that accounts for *all* the ways of addressing those abuses, including internal and public discussion within and about churches, not just state coercion.

### CONCLUSION

To be clear, I think the Supreme Court in *Hosanna-Tabor* should reaffirm the ministerial exception, treating it as a necessary implication of both the historical church-state settlement and the basic principles of the

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constitutional question, but at least one of them, along with some scholarship by critics of the exception, suggests that any broad ministerial exception, including a statutory one, would be unconstitutional, bad policy, or both. See, e.g., Professors’ Brief, *supra* note 27, at 4–16, 30–31, 36 (offering consequentialist arguments against the ministerial exception and arguing that the proper approach in light of these consequences is to “[a]pply employment discrimination law to a religious employer in the same way it would be applied to a secular employer,” with the only apparent protection of any kind being a narrow form of message-based associational freedom); Leslie C. Griffin, *Smith and Women’s Equality*, 32 CARDOZO L. REV. 1831, 1835 (2011) (criticizing legislatures for “seek[ing] to undo *Smith*’s regime by exempting religious groups from the law”) (link); *id.* at 1853 (“There is no good constitutional or policy reason to allow religious organizations to retaliate against their workers”). In fairness, some of these critics concede that some form of exception might be constitutionally required or permissible as a legislative matter. See, e.g., Corbin, *supra* note 33, at 2038 (suggesting that churches could still invoke a relatively narrow form of associational freedom in some cases); Leslie C. Griffin, *No Law Respecting the Practice of Religion*, 85 U. DET. MERCY L. REV. 475, 492 (2008) (contemplating some form of ministerial exception, but only where it involves core religious conduct) [hereinafter Griffin, *No Law*] (link); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1195–96 (arguing that legislatures could create a statutory ministerial exception). To the extent that the critics’ broader arguments are consequentialist, however, they call into question not only any *future* statutory ministerial exception, but the existing statutory exceptions for religious employers. See, e.g., Griffin, *No Law*, *supra* (arguing that the leading decision upholding Title VII’s exemption for religious employers who discriminate on the basis of religion, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, was wrong to the extent that it allowed a church to select a non-ministerial employee on the basis of religion (citing 483 U.S. 327 (1987))). These kinds of consequentialist arguments will be inaccurate unless they account for nonlegal methods of restraint as well as legal methods.

<sup>64</sup> See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 68 (1983) (link); *id.* at 4 (“The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention.”).

Religion Clauses. In addition, I believe the ministerial exception stands in for broader constitutional and political principles: that state power is vital but limited, that our social and constitutional infrastructure contains not just a single monolithic authority but a number of key independent institutions, and that pluralism, public discourse, and freedom are best served by appreciating the extent to which these institutions are and should be self-governing.<sup>65</sup>

But recognizing the power that churches and other central institutions possess is just the beginning of the conversation. Just as important as the scope of that power is the question of what should be done with it. We impoverish ourselves by talking only in Act II terms; by acting as if every important question is settled once we know whether the state or the church has the whip hand. We fail to appreciate the richness of institutional life in a pluralistic society, and the duty of both citizens and institutions to participate in that society after the court has spoken. Institutional autonomy is real, but it is a burden as well as a freedom. To have a “free Church in a free State,” we need responsible churches and responsible citizens. We must begin to think about our own parts in the drama once the curtain comes up on Act III.

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<sup>65</sup> See HORWITZ, *supra* note 11 (manuscript at 16–20).